State of Michigan
Supreme Court
Appeal from the Michigan Court of Appeals
[Kelly (M.J.), PJ., Cavanagh and Servitto, JJ.]

Kimberly Marie Marik, Plaintiff-Appellee, v Peter Brian Marik, Defendant-Appellant.	Supreme Court No. _____ Court of Appeals No. 333687 Trial Court No. 2011-0651-DM Macomb Circuit Court – Fam. Div. Hon. Kathryn A. George

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Defendant-Appellant's Application for Leave to Appeal

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Statement of Jurisdiction

The Supreme Court has jurisdiction under MCR 7.301(A)(2). On July 5, 2016, defendant timely claimed an appeal from the trial court's order dated June 13, 2016. **Appendix A**. The Court of Appeals issued its order dismissing defendant's appeal on July 12, 2016. **Appendix B**. Defendant moved for reconsideration. Reconsideration was denied in an order dated August 30, 2016. **Appendix C**. This application for leave to appeal is filed within 42 days after August 30, 2016.

Nature of Order Appealed and Allegations of Error

Defendant appeals an order of the Court of Appeals dismissing his appeal by right filed from a trial court order resolving a dispute between joint legal custodians concerning where the parties' children should attend school and a dispute over parenting time. The Court of Appeals entered an order on July 12, 2016, administratively dismissing defendant's appeal.

Contrary to several of its prior decisions, the Court of Appeals dismissal order stated that a trial court determination resolving a school enrollment dispute is not a final order appealable by right under MCR 7.202(6)(a)(iii). Defendant sought reconsideration of the dismissal order. On August 30, 2016, the Court of Appeals denied reconsideration, citing its recent published decision in *Ozimek v Rodgers*, COA No. 331726, 08/25/2016.

Defendant alleges that the Court of Appeals incorrectly interpreted and applied MCR 7.202(6)(a)(iii) when it administratively dismissed and then declined to reinstate his appeal. A dispute over school enrollment can come before the trial court only where the parties share legal custody. Therefore, an order resolving such a dispute inherently affects custody. MCR 7.202(6)(a)(iii) must be interpreted to include an orders deciding a school enrollment question as a "final order" appealable by right.

Statement of Question Presented

Whether the Court of Appeals erroneously dismissed defendant's appeal by right although the trial court's June 13, 2016, order denying defendant's motion to change the minor children's school enrollment and modify parenting time was a final order affecting custody of a minor under MCR 7.202(6)(a)(iii) and was therefore appealable by right?

Plaintiff-Appellee:	No
Defendant-Appellant:	Yes
Trial Court:	Did Not Address This Question
Court of Appeals:	No

Grounds for Appellant's Application for Leave to Appeal

The grounds for an appeal to this Court are defined in MCR 7.302(B). This case satisfies MCR 7.305(B)(3). The question presented is jurisprudentially significant.

Whether an order qualifies as a "postjudgment order affecting the custody of a minor" under MCR 7.202(6)(a)(iii) is ripe for review by this Court. This Court has already intervened in two very similar cases, *Ozimek* and *Madson*, when it vacated administrative dismissal orders and instructed the Court of Appeals in those cases to "issue an opinion specifically addressing the issue whether the order in question may affect custody of a minor within the meaning of MCR 7.202(6)(a)(iii), or otherwise be appealable by right under MCR 7.203(A)." *See* remand orders in *Ozimek* and *Madson*.

The issue in this case about the meaning of MCR 7.202(6)(a)(iii) is recurring, as evidenced by the number of cases besides this case, *Ozimek*, and *Madson*, recently filed with this Court. These include *Gregerson v Gregerson*, 498 Mich 951; 872 NW2d 480 (2015) (application denied); *Varran v Grannaman*, 497 Mich 929; 856 NW2d 555 (2014) (remanded for further consideration in lieu of granting leave); *Bolz v Bolz*, 495 Mich 986; 844 NW2d 123 (2014) (application denied).

This is besides the number of published Court of Appeals' decisions interpreting this court rule. These include *Varran v Granneman*, 312 Mich App 591; 880 NW2d 242 (2015); *Glaubius v Glaubius*, 306 Mich App 157; 855 NW2d 221 (2014); *Rains v Rains*, 301 Mich App 313; 836 NW2d 709 (2013); *Wardell v Hincka*, 297 Mich App 127; 822 NW2d 278 (2012); and *Surman v Surman*, 277 Mich App 287; 745 NW2d 802 (2007).

This case concerns the trial court's denial of a motion to determine the children's

school enrollment consistent with their best interests and to modify parenting time. Even plaintiff acknowledged when she opposed defendant's motion that defendant's requested relief affects custody of the minor children.

Defendant appealed the trial court's decision as a final order under MCR 7.202(6)(a)(iii)—a post-judgment order affecting the custody of a minor child. The Court of Appeals dismissed defendant's appeal, stating that the "postjudgment order denying defendant father's request to change the children's school enrollment cannot be considered an order affecting the custody of a minor under MCR 7.202(6)(a)(iii)."

This case is jurisprudentially significant under MCR 7.305(B)(3) because the Court of Appeals' order dismissing this case, along with the published dismissal decisions in *Madson* and *Ozimek*, contradicts its own prior published opinions. In *Varran v Granneman*, 312 Mich App 591, 604; 880 NW2d 242 (2015), the Court of Appeals held that a decision affecting the legal custody of a minor, which is the essential element of a school enrollment dispute, was a decision affecting custody under MCR 7.202(6)(a)(iii).

However, in both *Madson* and *Ozimek* (and by implication the instant case because of the citation to *Ozimek* in the order denying reconsideration), the Court of Appeals said the opposite:

> [H]ad our Supreme Court intended the court rule to embrace both distinct concepts [legal custody and physical custody], it would have so stated.
>
> An extension of this Court's jurisdiction to incorporate legal custody would so expand the rule as to nullify the qualifying language "affecting the custody of a minor." To extend the court rule to encompass all postjudgment decisions regarding minors in domestic relations appeals would be to return to the jurisdictional standard before the amendment of the court rule.

08/25/16 *Madson* COA Opinion, pp 7-8.

> When the Supreme Court amended the rule in 1994, it clearly intended to limit orders appealable by right. To interpret the court rule as appellant proposes would be counter to that obvious intent. Reinforcing that conclusion is the fact that the court rule does not expressly indicate that it includes the concept of "legal" custody. Had the Supreme Court intended for the court rule to include "legal" custody, it would have included the term. Absent that specific language, this Court should not broadly interpret the court rule.
>
> This Court has not traditionally included legal custody considerations in the interpretation of MCR 7.202(6)(a)(iii) and has dismissed for lack of jurisdiction cases challenging school choice decisions that do not alter parenting time and thus do not influence where the child will live. This Court, however, has not always been consistent in its dismissal of cases involving a choice of schools.
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> Given the lack of clarity regarding whether legal custody should be included in the definition of custody in MCR 7.202(6)(a)(iii), we urge our Supreme Court to weigh in on the issue. Further, should practitioners wish to promote an expanded court rule, our Supreme Court would be the proper venue for that request.

08/25/16 *Ozimek* COA Opinion, p 6.

Determining whether an order falls within MCR 7.202(6)(a)(iii) is not a straightforward endeavor. The inconsistency in the Court of Appeals decisions shows that the question of jurisdiction under MCR 7.202(6)(a)(iii) can be complicated. The difficulty is exacerbated by ambiguity in the language of the court rule. Defendant urges the Supreme Court either to amend the court rule to resolve the confusion, or to clarify its intent in an opinion.

Statement of Facts

Procedural History: This is a post-divorce proceeding affecting child custody and parenting time. The parties were divorced on October 21, 2011, in the Macomb County Circuit Court – Family Division. **Appendix D**. The judgment granted the parties joint legal and joint physical custody of their two minor children. At the time of divorce, the children, twin boys, were not yet school age.

On April 20, 2016, when the children were nine years old, defendant filed a motion and supporting brief to change the minor children's school enrollment and to modify parenting time. **Appendix E** (motion and exhibits) and **Appendix F** (brief). Plaintiff filed a response opposing defendant's motion. **Appendix G**.

Defendant's Motion was heard by a friend of the court referee on May 2, 2016. At the conclusion of the referee hearing, the referee recommended that defendant's motion be denied. **Appendix H**. Defendant filed timely objections to the referee's recommendation and demanded a de novo hearing before the trial court. **Appendix I**. Plaintiff filed a response to defendant's objections. **Appendix J**.

The trial court briefly heard defendant's motion on June 13, 2016. Counsel was permitted to argue and both parties were sworn to answer a few questions. There was no direct or cross-examination of either party and no exhibits were admitted into evidence. At the conclusion of the hearing, the trial court denied defendant's motion. 6/13/16 transcript attached as **Appendix K**. An order incorporating the trial court's ruling was entered immediately following the hearing. **Appendix A**.

On July 5, 2016, defendant filed a timely appeal by right to the Michigan Court of

Appeals from the trial court's June 13 order. A week later, on July 12, 2016, the Court of Appeals administratively dismissed the appeal, stating "The postjudgment order denying defendant father's request to change the children's school enrollment cannot be considered an order affecting the custody of a minor under MCR 7.202(6)(a)(iii)." **Appendix B**.

On July 19, 2016, defendant moved for reconsideration of the dismissal order. **Appendix C**. That was followed by an addendum to the motion on July 20, 2016, after this Court vacated an identical dismissal order in *Ozimek v Rodgers*, SC No. 153836, COA No. 331726, and remanded the issue of jurisdiction to the Court of Appeals for issuance of an opinion on whether an order resolving a school enrollment dispute between parents who share joint legal custody "may affect custody within the meaning of MCR 7.202(6)(a)(iii)…." Addendum with copy of this Court's *Ozimek* remand order attached as **Appendix L**.

On August 25, 2016, the Court of Appeals issued its published opinion in *Ozimek* (**Appendix M**) and a published opinion in a similar case, *Madson v Jaso*, COA No. 331605, SC No. 153729, which has also been remanded by this Court to the Court of Appeals for an opinion on the "final order" question. **Appendix N**. In both cases, the Court of Appeals held that the trial court orders addressing school change (Ozimek) and parenting time (Madson) did not "affect custody" and were therefore not final orders appealable by right. Five days later, on August 30, 2016, the Court of Appeals denied defendant's reconsideration motion in a three sentence order citing its *Ozimek* decision.

On October 6, 2016, the appellant in *Madson v Jaso* applied for leave to appeal with this Court challenging the Court of Appeals interpretation of MCR 7.202(6)(a)(iii). That

appeal has been assigned SC No. 154529. Within the next several weeks, the appellant in *Ozimek* will apply for leave to appeal raising the same challenge to the Court of Appeals interpretation of MCR 7.202(6)(a)(iii) that was raised in *Madson* and will be raised in the instant case.

The issue raised in these three appeals is one of the most jurisprudentially significant family law issues presented to this Court in several years. It addresses whether parents and children affected by important child-related decisions in the trial court are entitled to an appeal by right to the Court of Appeals where the factual findings on which those decisions were based have not previously been tested on appeal.

Factual Background: The trial court asked the parties brief questions, but otherwise took no testimony and no exhibits were admitted into evidence. For that reason, there is no record to cite for the basic background facts underlying defendant's motion to change the children's school enrollment and modify parenting time. However, that is not an impediment to this Court's review of the narrow legal issue before it. The only issue this Court must address at this time is whether an order resolving a school enrollment dispute between parents who share legal custody (and in this case also physical custody) is an order "affecting custody." If so, it is a final order appealable by right to the Court of Appeals.

When the parties were divorced in 2011, their twin sons were only four years old and not yet attending school full-time. The agreed-upon divorce judgment granted the parties joint legal and joint physical custody. The legal custody provision enumerated many areas of joint decision making, including "decisions involving the health, education,

and welfare of the children." JOD, p 3. The physical custody provision provided that the children's primary residence was with plaintiff.

The judgment contained a detailed parenting time schedule. JOD, pp 3-5. Overall, parenting time was divided so the children spent approximately 55% of their overnights with plaintiff and 45% with defendant.

By early 2016, despite that fact that the children were now more than twice the age they were during the divorce, the original parenting time schedule remained in effect. They attended Kenbrook Elementary in the Farmington School District. The decision to enroll the children at Kenbrook was make unilaterally by plaintiff without discussion with or agreement by defendant.

The Farmington Schools are struggling with decreased enrollment and financial troubles. Kenbrook was on the 2015 Building and Site Utilization committee list of recommended school closures. Although it remains open after receiving a reprieve during the spring of 2016, closure in the near future remains possible.

Defendant was remarried and lived with his wife and 15-year-old stepdaughter in Waterford. MI. He believed the children's best interests would be served by enrolling them at Our Lady of Refuge, a Catholic school in Orchard Lake, MI. Defendant was also concerned that plaintiff and her family were actively undermining his relationship with the children by speaking of him negatively, depriving him of access to the children's homework, failing to advise him of the children's medical treatment, refusing to participate in counseling, among other things.

In April of 2016, defendant filed a post-judgment motion seeking a court order to

enroll the children at Our Lady of Refuge and modifying the parenting time schedule so the children would be with each parent half the time. His motion, containing over eight pages of detailed allegations, alleged new facts and changed circumstances since entry of the divorce judgment supporting his requested relief.

Among the alleged facts were the superior academic performance of students at Our Lady of Refuge when compared with Kenbrook. He also cited smaller class sizes and a broader-based curriculum at Our Lady of Refuge among several reasons the children should be enrolled there instead of Kenbrook.

Defendant's motion requested an evidentiary hearing so he could prove the facts alleged in his motion. Attached to the motion were news stories about the potential closure of Kenbrook and academic information about both Kenbrook and Our Lady of Refuge. Defendant did not allege that the children were not doing well at Kenbrook, but instead maintained that they would do better if exposed to the superior academic and spiritual environment at Our Lady of Refuge.

Defendant's motion was supported by a brief citing the law governing post-divorce modification of child-related provisions. The brief matched defendant's factual allegations with the best interests factors in MCL 722.23, which is Section 3 of the Child Custody Act.

Plaintiff filed a written response opposing defendant's motion and denying many of defendant's alleged facts. She admitted that the parties' shared joint legal and physical custody and that parenting time was divided so the children were with her 55% of the time and with defendant 45% of the time. She claimed the children were doing well academically at Kenbrook. She concluded by denying that defendant could demonstrate

proper cause or changed circumstances sufficient to change the children's school enrollment or modify parenting time.

Defendant's motion was initially heard by a friend of the court referee on May 2, 2016. The referee issued a recommended order that defendant's motion be denied for "lack of good cause" and failure to show "material change of circumstances." The referee found that the facts alleged by defendant were "normal life changes" that failed to meet the threshold for post-divorce modification.

Defendant filed objections to the referee's recommended order and demanded a de novo hearing before the trial judge. Defendant asserted in his objections that the referee applied an incorrect legal standard. Under *Shade v Wright*, 291 Mich App 17; 805 NW2d 1 (2010), "normal life changes" constitute proper cause or change in circumstances sufficient to modify parenting time.

Defendant also objected to the referee's recommendation denying the school change request because the referee imposed a "good cause" threshold to resolution of a school enrollment dispute that does not exist under the case law, notably Lombardo v Lombardo, 202 Mich App 151, 160; 507 NW2d 788 (1993) and *Pierron v Pierron*, 486 Mich 81; 782 NW2d 480 (2010).

Both *Lombardo* and *Pierron* provide that where parents sharing joint legal custody cannot agree on a school for the minor children, the court must evaluate the best interests of the children as they relate to the children's education. *Lombardo* at 160; *Pierron* at 93. The referee engaged in no such evaluation. Defendant also objected to the referee making a ruling without permitting him to present testimony at an evidentiary hearing.

Plaintiff responded to defendant's objections by claiming that the requested modification:

> …would amount to a change in the custodial environment which is prohibited under *Shade*, see also *Vodvarka vs. Grasmeyer*, 259 Mich App. 499 2003). The Judgment awards primary residence of the children to Plaintiff-mother, see Judgment page 3, and the extra overnights on Wednesdays would be disruptive to the established custodial school-week environment in favor of the Plaintiff-mother pursuant to the Judgment.
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> ***
>
> his proposed schedule would amount to a change in the custodial environment which is prohibited under *Shade*.

Plaintiff's Response to Defendant's Objections, p 3.

With this response, plaintiff agrees with defendant's position that the relief requested by defendant "affects custody" under MCR 7.202(6)(a)(iii). Therefore, any order deciding defendant's motion, whether to grant to deny, is a "final order" appealable by right to the Court of Appeals.

Plaintiff also equated her grant of "primary residence" in the divorce judgment with the right to decide where the children attend school. Plaintiff's Response to Defendant's Objections, p 7. This ignores not only the statutory definition of legal custody in MCL 722.26a(7)(b), but also the terms of the judgment itself requiring the parties to consult and cooperate on "decisions involving the health, education, and welfare of the children." JOD, p 3.

By law, and under the parties' own agreement, neither party's preference on school enrollment outweighs the other. When joint legal custodians disagree on school enrollment, "it is the court's duty to determine the issue in the best interests of the child.

Lombardo v Lombardo, 202 Mich App 151, 159; 507 NW2d 788 (1993). they disagree, the court is obligated to resolve the conflict after evaluating the bests interests of the children. *Lombardo* rejected the view that the parent with the most physical custody time decides where the children attend school.

Plaintiff's final argument in response to defendant's objections was that the school enrollment issue was already decided four years earlier. This is incorrect. In 2012, defendant moved to request that the children attend Our Lady of Refuge instead of the Farmington schools. In response to that motion, the trial court entered an order for evidentiary hearing. This order, dated August 27, 2012, also provided "***In the interim*** the children will begin school in the Farmington Hills School District for the 2012-2013 school year at Kenbrook Elementary." 8/27/12 order, ¶2 [Emphasis added]. The evidentiary hearing was scheduled for October 16, 2012.

Defendant withdrew his motion before the evidentiary hearing. The children started school and he didn't want to disrupt them in the midst of a school year. T 6/13/16, p 36-37. Therefore, there was no ruling determining which school was in the children's best interests. Contrary to plaintiff's assertion, the 2012 order entered nearly four years earlier was not a bar to defendant in 2016 seeking an order to enroll the children at Our Lady of Refuge based on new facts and circumstances, including the financial problems with the Farmington schools and the possible closing of Kenbrook Elementary.

At the trial court's June 13, 2016 hearing on defendant's motion, the trial court was overly focused on the 2012 interim order. Despite that fact that the 2012 interim order was four years old and the new motion was based on new facts, the trial court repeated

several times that the earlier motion had been withdrawn. T 6/13/16, pp 7-8, 36.

The trial court concluded that defendant was not properly motivated in seeking the school change or parenting time modification. T 6/13/16, pp 31-36. Defendant's motion was denied. A written order was entered at the conclusion of the June 13 hearing.

Argument

The Court of Appeals erroneously dismissed defendant's appeal by right although the trial court's June 13, 2016, order denying defendant's motion to change the minor children's school enrollment and modify parenting time was a final order affecting custody of a minor under MCR 7.202(6)(a)(iii) and was therefore appealable by right.

Standard of Review: Interpretation of a court rule is a question of law. Questions of law are reviewed de novo. *Matley v Matley*, 234 Mich App 535, 537, 594 NW2d 850, *vacated on other grounds,* 461 Mich 897, 603 NW2d 780 (1999).

Argument: Court rules have the same principles of construction as statutes. *Hinkle v Wayne Co Clerk*, 467 Mich 337, 340; 654 NW2d 315 (2002). A key rule of statutory construction is to "give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory," *State Farm & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002).

Under MCR 7.202(6)(a)(iii), a final order appealable by right includes, "in a domestic relations action, a postjudgment order ***affecting*** the custody of a minor." MCR 7.202(6)(a)(iii). [Emphasis added.] Both this Court and the Court of Appeals have clarified in their past decisions that an order need not ***change*** custody to ***affect*** custody. As well-established case law demonstrates, several categories of orders **affect** custody without **changing** custody. These include grants or denials of change of domicile, grants or denials of certain parenting time modification requests, and orders resolving school enrollment disputes between parents who share legal custody of their children.

In *Thurston v Escamilla*, 469 Mich 1009; 677 NW2d 28 (2004), this Court vacated a Court of Appeals order dismissing an appeal for lack of jurisdiction and held that an

order allowing a change of domicile was an order affecting custody. *Thurston*, 469 Mich at 1009. Although the trial court's order did "not mention a change of custody," "by permitting the children to be removed [to another state], the order [was] one 'affecting the custody of a minor.'" *Id*. (emphasis in original). In *Wardell v Hincka*, 297 Mich App 127, 131-33; 822 NW2d 278 (2012), the Court of Appeals, likewise, held that an order denying a change in custody was a "final order" because MCR 7.202(6)(a)(iii) uses the word "affects" not "change."

The *Wardell* panel noted:

> Black's Law Dictionary defines 'affect' as '[m]ost generally, to produce an effect on; to influence in some way.' Black's Law Dictionary (9th ed), p 65. *** MCR 7.202(6)(a)(iii) carves out as a final order among postjudgment orders in domestic relations actions those that affect the custody of a minor, not those that "change" the custody of a minor.

Wardell, 297 Mich App at 132.

The *Wardell* panel concluded that "when making determinations regarding the custody of a minor, a trial court's ruling necessarily has an effect on and influences where the child will live and, therefore, is one affecting the custody of a minor." *Id*. Likewise, in *Rains v Rains*, 301 Mich App 313, 323; 836 NW2d 709 (2013), it was held that an order denying a proposed change of domicile "affects custody" and is therefore a final order appealable by right. Therefore, whether a motion is granted or denied does not affect its status as a final order under MCR 7.202(6)(a)(iii). It is the issues raised in the motion that led to the order that determine whether the order "affects custody" and is therefore a "final order" appealable by right.

Changes in parenting time can also affect custody. In *Rains*, the Court of Appeals

explained that if a change in domicile would "substantially reduce the time a parent spends with a child," it might change the established custodial environment and would therefore affect custody. *Rains*, 301 Mich App at 324. When a child's established custodial environment is with both parents but the parenting time schedule is altered such that one parent is relegated to the role of "weekend parent," that alteration of parenting time changes the established custodial environment of the child. *Powery v Wells*, 278 Mich App 526, 528; 752 NW2d 47 (2008); *Gagnon v Glowacki*, 295 Mich App 557, 573; 815 NW2d 141 (2012). The parenting time order is then an order affecting custody. See *Varran v Granneman*, 312 Mich App 591, 603-604; 880 NW2d 242 (2015).

In *Varran v Granneman*, the Court of Appeals was asked by this Court to consider whether a grandparenting time order was an order affecting custody. *Id*. at 596. The Court of Appeals added to the above analysis that an order may affect the custody of a minor by affecting the ***legal custody*** of the minor. *Id*. at 604. It held that a grandparenting time order affects the legal custody of a child where a parent with legal custody has denied grandparenting time, because the grandparenting time order "interferes with [the] parent's fundamental right to make decisions concerning the care, custody, and control of his or her child." *Id*. at 605.

MCR 7.202(6)(a)(iii) does not define "custody." Child custody in Michigan is governed by the Child Custody Act, MCL 722.21 *et seq*. In *Grange Insurance v Lawrence*, 494 Mich. 475, 511; 835 NW2d 363 (2013), this Court recognized the dual aspects of custody - both physical and legal. In *Grange*, this Court cited to MCL 722.26a of the Child Custody Act, stating:

> Moreover, the Act allows for myriad possible scenarios in postdivorce familial relationships, recognizing different combinations of legal and physical custody, and offering flexibility in terms of parenting time arrangements.

Id. 494 Mich at 507-508 (FN 67 referencing MCL 722.26(a)).

Contrary to the analysis of the Court of Appeal in *Ozimek* and *Madson*, the joint custody statute cited by this Court in Grange declines to separately define legal and physical custody or create a hierarchy between them. Instead, there is simply "joint custody" which may include one or both of the following:

> (a) That the child shall reside alternately for specific periods with each of the parents.
>
> (b) That the parents shall share decision-making authority as to the important decisions affecting the welfare of the child.

MCL 722.26a(7).

Under this statutory scheme, shared decision-making (legal custody) on important decisions is every bit as much "custody" as alternating periods of residence (physical custody). The Court of Appeals in *Ozimek* and *Madson* offered no support for its view this Court could not have intended the term "affects custody" in MCR 7.202(6)(a)(iii) to also include legal custody. Such a view in inconsistent with Michigan public policy treating legal and physically custody as co-equally important components of parental rights.

Legal custody includes important decisions concerning children - including religious, educational, and associational decisions. *Meyer v Nebraska*, 262 US 390, 399, 401 (1923) {the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own"]; *Troxel v Granville*, 530 US 57 (2000) [parental care, custody, and control of children -

including associational decisions - perhaps the oldest of the fundamental liberty interests].

A dispute between parents with legal custody over where their children will attend school affects parental decision-making on an important issue relating to the best interests of the child. There is a substantial line of cases in which appeals of post-judgment orders deciding educational issues between joint legal custodians were treated as appeals of right. *Lombardo v Lombardo*, 202 Mich App 151; 507 NW2d 788 (1993); *Parent v Parent*, 282 Mich App 152, 153; 762 NW2d 553 (2009) [appeal of right from a post-judgment order granting a motion to enroll child in public school in a dispute between joint legal custodians]; *Pierron v Pierron*, 282 Mich App 222; 765 NW2d 345 (2009), aff'd 486 Mich 81 (2010) [an appeal of right from a post-judgment order maintaining children in their current district with joint legal custodians who cannot agree].

Of these decisions, only *Lombardo* preceded the existing court rule language that limited appeals by right in post-judgment matters to those that "affect custody." Therefore, the Court of Appeals reasoning in *Ozimek* that the court rule change effective in 1995 justifies dismissal of appeals by right in school enrollment cases is faulty. See also the very recent unpublished decisions in *Mellema v Mellema*, COA No. 329206, decided April 21, 2016 [change in school district affected joint legal custodial decision making], **Appendix O**; and *London v London*, COA No. 325710, decided October 13, 2015, **Appendix P**.

Conclusion: The court rule allowing appeals by right from post-judgment orders affecting custody recognizes the unique position of children in our legal system. Because these cases involve child custody (whether legal or physical), it is important there be consistency and certainty when addressing the jurisdictional threshold. Inconsistency in

treatment of post-judgment orders concerning custody (physical and legal) creates delay, additional litigation, and added emotional and financial expense. There is a negative effect on the parents and their children.

Unlike post-judgment orders in other types of cases, most of which relate to enforcement of an existing order, a post-judgment proceeding affecting custody, domicile, parenting time, or school enrollment in a domestic relations case must be based on changed facts and circumstances after the judgment or most recent modification order. These facts, and the trial court's application of those facts to the law, have never been tested on appeal. Given the importance of the issues , there should be at least one appeal by right when the trial court's decision is based on an entirely new set of facts and circumstances.

The understanding that legal custody, or shared decision making as it is referred to in the statute, is an essential parental right and responsibility led both the Court of Appeals and this Court to historically treat orders resolving parental disputes over school enrollment as final orders appealable by right under MCR 7.202(6)(a)(iii). It has only been in the last several months that the Court of Appeals abruptly reversed this approach and began administratively dismissing appeals by right from orders granting or denying school change motions. The Court of Appeals should not be allowed to subvert what was a consensus interpretation of this Court's rule merely to control its docket.

Leave should be granted and this Court should declare with finality that orders addressing both legal and physical custody fall within the term "affect custody" in MCR 7.202(6)(a)(iii). If this Court finds the current language of the rule too vague or confusing

for consistent application by the Court of Appeals, it should amend the rule.

There are several possible approaches. The best would be to recognize, as argued above, that post-judgment appeals from modifiable orders in domestic relations cases, because they are based on new facts never tested in the appellate process, should always be appealable by right. This would make post-judgment modification orders in custody (legal and physical), parenting time, and support, appealable by right. Enforcement orders, whether affecting property or support, would remain appealable by leave only. The rule would include in the definition of final order in MCR 7.202(6)(a)(iii), "In a domestic relations case, a post-judgment modifiable order."

If the Court wanted to limit appeals by right only to cases directly affecting custody, whether legal or physical, it could add the following to the definition of final order, "In a domestic relations case, a postjudgment order concerning legal or physical custody, including parenting time, grandparenting time, change of residence, education, religious upbringing, health care, paternity and guardianship."

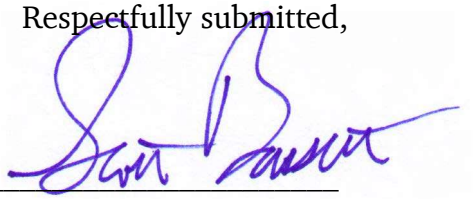
Either of these proposals would be more clear and less confusing than the current language. They would also assure these important decisions will receive a substantive review by the Court of Appeals.

Conclusion/Relief Requested

Defendant requests this Court grant leave to appeal. Once granted, this Court should reverse the Court of Appeals dismissal of his appeal by right from the trial court's order denying his motion to change the children's school enrollment and modify parenting time. The matter should be remanded to the Court of Appeals for full consideration of his appeal as an appeal by right.

In addition, this Court should amend MCR 7.202(6)(a)(iii) to clarify the post-judgment orders considered final orders appealable by right.

Respectfully submitted,



By:_____ Dated: October 10, 2016
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